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Comment

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Daniel Kunin submitted a claim to Benefit Trust Life Insurance Company for over $50,000 in medical expenses incurred from his son's treatment for autism in 1986.[1] Benefit Trust refused to reimburse Kunin fully because its plan administrator determined that autism fell within a policy term limiting coverage for "mental illness" to $10,000.[2] Because Kunin's employer purchased a group health insurance policy that was part of a benefit plan governed by ERISA,[3] Kunin filed suit in federal district court, claiming that Benefit Trust acted contrary to ERISA in denying benefits.[4] The district court found that Benefit Trust acted arbitrarily and capriciously, and ordered full coverage.[5]

In *Kunin v. Benefit Trust Life Insurance Co.*,[6] the Ninth Circuit affirmed the district court's determination, holding that Benefit Trust did not have adequate grounds for concluding that autism was a mental illness.[7] The court also held that, since "mental illness" was an ambiguous term, the rule of *contra proferentem*, by which ambiguous terms in a written agreement are construed against its drafter, dictated construction against Benefit Trust.[8]

Contra proferentem ("the rule") has received mixed re-

1. Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 535 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991).
2. *Id.*
3. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988).
4. *Kunin*, 910 F.2d at 535.
5. *Id.*
6. 910 F.2d 534.
7. *Id.* at 538.
8. *Id.* at 541.

views in the context of ERISA contracts.[9] The Ninth Circuit's holding in *Kunin*, that the rule should apply to ERISA plans, runs contrary to the Eighth Circuit's position that the rule should not apply to ERISA cases.[10] The circuit split over this question undermines the uniformity of treatment of ERISA issues and raises significant concerns about the distribution of medical costs between contracting parties. Insurers fear courts will all too readily apply the rule for the sake of equity even when contract language is not ambiguous or could be given meaning with extrinsic evidence. Employees, who often feel vulnerable in the bargaining relationship with insurers and face potentially ruinous costs if denied coverage, seek any leverage that the rule can provide to protect their interests under ERISA.

This Comment critiques the Ninth Circuit's opinion in *Kunin*. While finding fault with the court's reasoning, this Comment ultimately agrees that a version of the *contra proferentem* rule should apply to ERISA plans, either through federal common law or by an amendment to ERISA. Part I explores the legal context of *Kunin* and discusses the continuing nature of the controversy in subsequent cases. Part II describes the *Kunin* decision itself. Part III analyzes *Kunin*, and considers whether ERISA preempts the *contra proferentem* rule, whether precedent permits favoring one party in construing a term in an ERISA plan, and whether the rule can be fashioned into a federal common-law rule. Part III also offers alternative proposals to reconcile applying the *contra proferentem* rule to ERISA plans. The first proposal applies the rule of *contra proferentem* to ERISA contracts through federal common law, but recognizes the shortcomings of blanket application to the myriad possible ERISA plans. The second proposal involves an amendment to ERISA that would rectify the potential problems of common-law application by construing ambiguous terms in all ERISA plans in the employee's best interest.

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9. This Comment uses the terms "contract" and "plan" synonymously. Technically, the terms could have different meanings. For example, an employee benefit plan may include an insurance contract that describes the medical or life benefits under the plan, so that they can be understood as separate entities. Any distinction between the terms, however, is not relevant to the arguments advanced in this Comment. Regardless of whether *contra proferentem* can be understood to affect "plans" or "contracts," concerns surrounding application of the rule would be the same.

10. *See* Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150, 153-54 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2872 (1991).

I. *KUNIN*'S LEGAL CONTEXT

A. THE *CONTRA PROFERENTEM* RULE AND INSURANCE CONTRACTS

The rule of *contra proferentem* provides that ambiguous terms in a contract be construed against their drafter.[11] Rooted in common law, this rule of contract construction historically has applied to adhesion contracts, particularly insurance contracts.[12] Indeed, the *contra proferentem* rule has evolved into

11. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."); *see also* BLACK'S LAW DICTIONARY 327 (6th ed. 1990) ("Used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language.").

Some commentators and courts refer to the rule as *contra proferentem*. *See, e.g.*, Stephen M. Hoke, *Contract Interpretation in Commercial Insurance Disputes: The Status of the Sophisticated Insured Exception and Alternatives to the Ambiguity Rule*, 40 FED'N INS. & CORP. COUNS. Q. 259, 261 (1990). *Contra proferentem* literally means "[a]gainst the party who proffers or puts forward a thing." BLACK'S LAW DICTIONARY 327 (6th ed. 1990). Others use the term "ambiguity doctrine" or "ambiguity rule" to describe the principle of construing ambiguous terms against the drafter. *See, e.g.*, David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988).

12. It has been almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policyholder or beneficiary thereof, wherever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance. The courts have felt that the language of insurance policies is selected by one of the parties alone, and the language employed by that party should be construed against it. Thus, if the meaning of the words employed is doubtful or uncertain, or if for any reason an ambiguity exists either in the policy as a whole or in portions thereof, the insured should have the benefit of a favorable construction in such instance.

13 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 7401 (1976) (citations omitted); *see also* 2 GEORGE J. COUCH, COUCH ON INSURANCE § 15:83 (1984) ("It is only when the language in the contract is ambiguous, or open to construction, that the rule obtains that it will be strictly construed against the insurer."); ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 6.02 (1988) ("If . . . the insurance contract is fairly susceptible of two different interpretations, another rule of construction will be applied: the interpretation that is most favorable to the insured will be adopted.").

While insurance contracts formerly were the product of equal, arm's-length bargaining, the incorporation of insurance companies in America in the 1790s and the subsequent marketing of fire insurance policies to individuals created inequalities in the bargaining relationship that encouraged courts to apply the rule. Miller, *supra* note 11, at 1851. As a standard form contract that forces the insured to accept its terms without negotiation, the insurance contract is often called an adhesion contract. *Id.* at 1854.

one of the most fundamental and widely used methods of interpreting insurance contracts.[13] Both federal and state courts apply the rule,[14] most commonly to insurance contracts where the insured contracts directly with the insurer. Some courts also apply it to cases where an employer purchases a group policy.[15] The rule's central rationale is that un-negotiated contract terms and unequal bargaining power between parties demand that the law tip interpretation against the more sophisticated insurer, and in favor of the insured.[16]

Courts differ, however, in their use of the rule. Some use the rule as a last resort, applying it only after extrinsic evidence has failed to clarify the meaning of the terms.[17] Other courts apply the rule automatically on finding a term facially ambiguous.[18]

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13. Barry R. Ostrager & David W. Ichel, *Should the Business Insurance Policy Be Construed Against the Insurer? Another Look at the Reasonable Expectations Doctrine*, 33 FED'N INS. COUNS. Q. 273, 275 n.12 (1983). Every state employs some version of the rule of *contra proferentem* to insurance contracts. *See* Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 535 (9th Cir.), *cert denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991).

14. *See, e.g.*, United States v. Seckinger, 397 U.S. 203, 210, 216 (1970); Westchester Resco Co. v. New England Reinsurance Corp., 818 F.2d 2, 3 (2d Cir. 1987); Landress Auto Wrecking Co. v. United States Fidelity and Guar. Co., 696 F.2d 1290, 1292 (11th Cir. 1983); HKH Co. v. American Mortgage Ins. Co., 685 F.2d 315, 319 (9th Cir. 1982); Miles v. St. Paul Fire & Marine Ins. Co., 381 So. 2d 13, 14 (Ala. 1980); Connie's Constr. Co. v. Fireman's Fund Ins. Co., 227 N.W.2d 207, 210 (Iowa 1975); Travelers Ins. Co. v. North Seattle Christian & Missionary Alliance, 650 P.2d 250, 254 (Wash. 1982).

15. *See* Lessard v. Metropolitan Life Ins. Co., 568 A.2d 491, 500 (Me. 1989); Kyte v. Fireman's Fund Am. Ins. Cos., 549 S.W.2d 366, 367-68 (Mo. Ct. App. 1977). *But see* Blue Cross, Inc. v. Ayotte, 315 N.Y.S.2d 998, 1001 (App. Div. 1970) (declining to apply the *contra proferentem* rule to an employer-funded group health policy).

16. Hoke, *supra* note 11, at 262; Ostrager & Ichel, *supra* note 13, at 278-79. Other justifications for employing the rule to interpret insurance contracts include detrimental reliance by the insured, the quasi-public nature of the insurance industry, the efficiency of risk-spreading, judicial paternalism, and traditional doctrines of equity. Miller, *supra* note 11, at 1855-57.

17. *See, e.g.*, Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983); Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17 (1st Cir. 1982); Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co., 641 F. Supp., 297, 307, 309 (E.D. Pa. 1986), *aff'd mem.*, 833 F.2d 307 (3d Cir. 1987); Rainier Credit Co. v. Western Alliance Corp., 217 Cal. Rptr. 291, 295 (1985); Playtex FP, Inc. v. Columbia Casualty Co., 609 A.2d 1087, 1092 (Del. Super. Ct. 1991); M-Z Enters., Inc. v. Hawkeye Sec. Ins. Co., 318 N.W.2d 408, 412 (Iowa 1982); Collier v. MD-Individual Practice Ass'n, Inc., 607 A.2d 537, 539 (Md. 1992).

18. *E.g.*, Bruder v. Country Mut. Ins. Co., 596 N.E.2d 875, 878 (Ill. App. Ct.), *appeal granted*, 602 N.E.2d 447 (Ill. 1992); Eli Lilly Co. v. Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985); Krombach v. Mayflower Ins. Co., 827 S.W.2d

Recently, some courts have begun to limit the application of the rule to insurance contracts where the parties bargained with unequal leverage and did not negotiate the terms of the contract.[19] Thus, even in jurisdictions that normally apply the rule, courts may sometimes not apply it to insurance contracts between large, sophisticated corporations and equally sophisticated insurance companies.[20] Still, many jurisdictions continue to wield the rule of *contra proferentem* in any case where an insurance contract contains ambiguous terms.[21]

208, 210 (Mo. 1992); United States Bronze Powders, Inc. v. Commerce & Indus. Ins. Co., 611 A.2d 667, 670 (N.J. Sup. Ct. 1992); Gunn v. Aetna Life & Casualty Co., 629 S.W.2d 59, 60 (Tex. Ct. App. 1981); Tempelis v. Aetna Casualty & Sur. Co., 485 N.W.2d 217, 221 (Wis. 1992).

A recent development of the law in insurance contracts does not even require courts to find ambiguity before construing a provision against the drafter. All that is needed is for a particular interpretation to meet the insured's "reasonable expectations." The most famous explanation of the reasonable expectations doctrine provides that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970). Fulfilling the reasonable expectations of the insured is an even more liberal rule of construction than the *contra proferentem* rule because the reasonable expectations doctrine does not require the terms to be ambiguous. *See* WINDT, *supra* note 12, § 6.03. The number of jurisdictions applying some form of the reasonable expectations doctrine appears to be growing, with as many as 16 states using it in 1990. Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 n.5 (1990). The chief complaint against the doctrine is that courts have been unable to apply it in a consistent manner, undermining its power as a solid legal rule. *Id.* at 824.

19. *See* Ostrager & Ichel, *supra* note 13, at 286-90; *see also* First State Ins. Underwriters Agency Reinsurance Corp. v. Travelers Ins. Co., 803 F.2d 1308, 1314 n.5 (3d Cir. 1986) (stating that the rule of *contra proferentem* does not apply where sophisticated parties negotiated and executed an insurance contract); Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1986) (stating that no justification for rule exists "when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers"); J. Ray McDermott & Co. v. Fidelity & Casualty Co., 466 F. Supp. 353, 366 (E.D. La. 1979) (recommending no application of the rule when much of the language of the insurance contract was drafted by the insured's broker); 13 APPLEMAN & APPLEMAN, *supra* note 12, § 7402, at 301 ("[I]t has been held that the principle that ambiguities in policies should be strictly construed against the insurer need not be strictly adhered to in instances where one large corporation and one large insurance company both advised by competent counsel do business with each other.").

20. *See supra* note 19.

21. *E.g.*, Ogden Corp. v. Travelers Indem. Co., 681 F. Supp. 169, 173-74 (S.D.N.Y. 1988) (rejecting exception to the rule for sophisticated insured); Aer-

Courts also differ as to when an insurance contract term is ambiguous.[22] Generally, courts determine ambiguity from the standpoint of a reasonable layman interested in purchasing insurance.[23] If a term is susceptible of different interpretations, it is ambiguous.[24] When determining ambiguity, courts may also consider whether jurisdictions differ in their interpretation of terms, and whether the insured understands the term.[25]

B. THE *CONTRA PROFERENTEM* RULE AND ERISA PLANS

ERISA governs employee-provided medical plans, whether self-funded or provided through insurance.[26] Congress passed

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ojet-General Corp. v. San Mateo County Superior Court, 257 Cal. Rptr. 621, 626 (Ct. App. 1989) (ignoring sophistication of insured and applying the rule); National Tea Co. v. Commerce & Indus. Ins. Co., 456 N.E.2d 206, 216 (Ill. App. Ct. 1983) (upholding the application of the rule where the insured is a large corporation). The rule of *contra proferentem*, as well as the doctrine of reasonable expectations, have been the targets of criticism on several fronts. The primary complaint asserts that new realities, which militate against the reasons behind its application, dictate severe limitations on the rule. *See supra* note 19 and accompanying text (discussing policies and providing cases for limiting the rule to the occasion where the insured is unsophisticated). The rule also has been criticized for causing economic uncertainty and inefficiency for insurance companies, which in turn increase premiums. Miller, *supra* note 11, at 1860-62. Another criticism is that the judicial activism necessary to apply the rule (especially in determining ambiguity) undermines the uniformity of the law and weakens its precedential power. *Id.* at 1863-64; *see* Mary P. Benz, *Interpretation of Insurance Policies Governed by ERISA*, 59 DEF. COUNS. J. 71, 78-79 (1992). The solution for these problems tends to involve application of general contract principles, as provided in the RESTATEMENT (SECOND) OF CONTRACTS (1981), to ascertain the intent of the parties and to render justice when necessary. *See* Benz, *supra*, at 77-79; Miller, *supra* note 11, at 1864-72; Ostrager & Ichel, *supra* note 13, at 286-96. Critics do not abandon the rule entirely, however, but apply it as a last resort after every effort is made to give meaning to the disputed term. Benz, *supra*, at 77; Miller, *supra* note 11, at 1869.

22. For an interesting categorical approach to how courts determine ambiguity, see Miller, *supra* note 11, at 1853 n.28.

23. WINDT, *supra* note 12, § 6.02; 2 COUCH, *supra* note 12, § 15:84.

24. WINDT, *supra* note 12, § 6.02. However, the term in question should not be labeled "ambiguous" for the sake of equity if the term is actually plain and clear. 2 COUCH, *supra* note 12, § 15:84. The circumstances of the concrete case and the overall context of the contract should be examined. *Id.*; WINDT, *supra* note 12, § 6.02.

25. Miller, *supra* note 11, at 1853 n.28; WINDT, *supra* note 12, § 6.02; 2 COUCH, *supra* note 12, § 15:84.

26. ERISA was created with four main effects in mind. First, ERISA protects participants and beneficiaries in employee benefit plans by constructing individual statutory rights to enforce obligations through action in federal courts. 29 U.S.C. § 1001(b) (1988); EMPLOYEE BENEFITS LAW 17 (Steven J. Sacher et al. eds., 1991). Second, ERISA protects plan participants and beneficiaries by regulating the design and operation of pension plans, and requiring

ERISA to protect employee interests and to ensure uniform enforcement of pension laws.[27] Prior to ERISA, courts considered pensions and insurance plans under the vagaries of state contract law.[28] ERISA now establishes, nationwide, relationships based on trust law, where an employer, union, or insurance company may act as a fiduciary or trustee, and the employee acts as a beneficiary.[29] While ERISA applies to pensions and welfare plans, this Comment focuses on the application of the *contra proferentem* rule to welfare plans.[30]

The broad federal mandate of ERISA is manifested in its preemption clause,[31] which substantially blunts the force of state laws on ERISA insurance contracts.[32] Although the pre-

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reporting and disclosure for welfare plans. 29 U.S.C. § 1001(b), (c) (1988); EMPLOYEE BENEFITS LAW, *supra*, at 17. Third, ERISA creates a system of governmental enforcement of rights under the legislation. EMPLOYEE BENEFITS LAW, *supra*, at 18. Fourth, ERISA buttresses the foregoing protections by providing insurance protection for certain types of pension benefits. *Id.*

27. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109-10 (1989); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987); EMPLOYEE BENEFITS LAW, *supra* note 26, at 18. For a list of the policy considerations driving ERISA, see 29 U.S.C. § 1001(a) (1988).

28. *See Bruch*, 489 U.S. at 112-13; EMPLOYEE BENEFITS LAW, *supra* note 26, at 358.

29. *Bruch*, 489 U.S. at 109.

30. Welfare plans are defined in ERISA as any plan, fund or program established to provide, through the purchase of insurance or otherwise, health benefits as well as benefits related to disability, accidents, death, and unemployment. 29 U.S.C. § 1002(1) (1988).

31. ERISA's preemption clause provides:

> Except as provided in subsection (b) of this section, the provisions of this chapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (1988).

32. "A recent LEXIS search indicates that there are now over 2,800 judicial opinions addressing ERISA preemption." District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580, 586 n.3 (1992) (Stevens, J., dissenting). The issue of preemption in ERISA also has received considerable attention from commentators. *See* E. Thomas Bishop & Paula Denney, *Hello ERISA, Good-Bye Bad Faith: Federal Pre-emption of DTPA, Insurance Code, and Common Law Bad Faith Claims*, 41 BAYLOR L. REV. 267 (1989); Robert M. Chemers & Robert J. Franco, *The Preemption of State Claims Under ERISA*, 78 ILL. B.J. 550 (1990); William A. Chittenden, III, *ERISA Preemption: The Demise of Bad Faith Actions in Group Insurance Cases*, 12 S. ILL. U. L.J. 517 (1988); George L. Flint, Jr., *ERISA: Nonwaivability of Preemption*, 39 KAN. L. REV. 297 (1991); David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427 (1987); William J. Kilberg & Paul D. Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984); Richard M. Rindler & Evan Miller, *Thoughts on a Faded Peacock: The Effect of ERISA's*

emption clause covers any state law directed at employee benefit plans, the "savings" clause in ERISA permits courts to apply state laws that "regulate insurance."[33] Self-insured plans,[34] because they cannot be deemed part of the insurance industry,

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Preemption Provision on State Third Party Prescription Drug Program Statutes, 39 VAND. L. REV. 23 (1986); Steven L. Brown, Note, *ERISA's Preemption of Estoppel Claims Relating to Employee Benefit Plans*, 30 B.C. L. REV. 1391 (1989); James R. Bruner, Note, *AIDS and ERISA Preemption: The Double Threat*, 41 DUKE L.J. 1115 (1992); Caroline W. Cleveland, Note, *ERISA Preemption: As the Federal Courts Identify the Outer Boundaries of ERISA's Preemption Clause, What Are the Implications for South Carolina State Actions?*, 42 S.C. L. REV. 743 (1991); Laurie F. Hasencamp, Note, *ERISA Preemption of State Fair Employment Laws*, 59 S. CAL. L. REV. 583 (1986); Robert S. McDonough, Note, *ERISA Preemption of State Mandated-Provider Laws*, 1985 DUKE L.J. 1194; Shawn C. Moore, Casenote, *Erisa Preemption of State Subrogation Laws:* Baxter v. Lynn *and* FMC Corp. v. Holliday, 43 ARK. L. REV. 477 (1990); Karen L. Peterson, Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519 (1988); Keith A. Rabenberg, Note, *Punitive Damages and ERISA: An Anomalous Effect of ERISA's Preemption of Common Law Actions*, 65 WASH. U. L.Q. 589 (1987); Rosemary Scariati, Note, *The Effect of Choice of Law on Federal Jurisdiction Under ERISA: Defining the Scope of the Act or Omission Preemption Exception*, 58 FORDHAM L. REV. 997 (1990); Lawrence A. Vranka, Jr., Note, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607 (1989).

33. The savings clause reads: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A) (1988).

Subparagraph (B), to which the savings clause refers, is called the "deemer" clause. It provides in pertinent part:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B) (1988).

Thus, if an ERISA plan is deemed to be involved with insurance to permit state regulation, the relevant state law is not saved from preemption. *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 409-10 (1990). The language of the savings clause and deemer clauses, and their relationship, caused the United States Supreme Court to note they "are not a model of legislative drafting." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). At best these clauses are unhelpful; at worst they will continue to provoke costly litigation seeking to determine their meaning.

34. Self-insured plans are those where an employer or employer group pools assets to establish the funds that are paid to beneficiaries under the terms of the plan. EMPLOYEE BENEFITS LAW, *supra* note 26, at 1051. While the employer may contract with an insurance company or health maintenance organization to administer the plan, such an organization does not collect the premiums or bear the risk. *Id.* at 1051-52.

are not affected by state laws regulating insurance.[35]

For the purpose of the savings clause, whether a state law regulates insurance depends on two factors: the "common sense" understanding of the savings clause and the case law interpretation of "insurance."[36] Courts examine the state law in question and decide if it regulates insurance by determining its ability to transfer or spread an insured's risk, its importance to the policy relationship between the insurer and the insured, and the exclusivity of its application to the insurance industry.[37]

In addition to preemption issues, courts must address whether ERISA permits favoring one party over the other in construing plan terms. In *Firestone Tire & Rubber Co. v.*

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35. *Holliday*, 111 S. Ct. at 409-10; *see infra* note 37 (describing the analysis in *Holliday*).

36. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-49 (1987).

37. *Id.* The Court borrowed these criteria from Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129 (1982), which analyzed the phrase "business of insurance" under the McCarran-Ferguson Act.

The United States Supreme Court has visited the preemption issue (and whether a state law regulates insurance) several times since the inception of ERISA. Three cases appear worthy of note in relation to *Kunin*: Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985); Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987); and FMC Corp. v. Holliday, 111 S. Ct. 403 (1990).

In *Metropolitan Life*, the Court saved from preemption a state law that mandated certain benefits in health insurance contracts governed by ERISA. 471 U.S. at 758. Applying the criteria defining the "business of insurance," the Court found that "mandated-benefit laws are state regulation of the 'business of insurance.'" *Id.* at 743.

The Court in *Dedeaux* determined that the state common law action of bad faith, allowing punitive damages for tortious breach of contract, was preempted. 481 U.S. at 57. Since the plaintiff sought recovery against an insurance company which funded the relevant plan, the Court analyzed whether the state law of bad faith regulated insurance. The Court reasoned that a common-sense reading of the "business of insurance" revealed that the state law of bad faith did not regulate the insurance industry, despite its longstanding application to insurance contracts. *Id.* at 50. The Court's supported its holding by concluding that the law of bad faith does not effect the spreading of policyholder risk. *Id.* Finally, the Court looked toward the enforcement scheme of ERISA as evidence of Congressional intent to preempt state recovery laws. *Id.* at 52-56.

Most recently, in *Holliday*, the Court held that ERISA preempted a state statute that precluded ERISA plans from subrogating damages won by a tort claimant. 111 S. Ct. at 411. The problem with the state regulation involved the deemer clause of ERISA. While the law clearly regulated insurance to fall within the savings clause, the regulated plan in question, which was self-funded, could not be deemed an insurance company for the purpose of being saved. *Id.* at 409. The law directly regulated employee benefit plans, including those that were not funded by insurance companies. *Id.*

Bruch[38] the United States Supreme Court recently indicated that courts should interpret ERISA plans according to principles of trust law.[39] The Court stated in dicta that judges should not favor either party in interpreting plan terms. If lower courts accord this dicta the force of law, any favorable treatment in interpreting terms will become suspect.[40]

Even without *Bruch*, lower courts have been somewhat reluctant to apply the rule of *contra proferentem*, a contract principle of state common law origin, to ERISA insurance contracts. Indeed, before *Kunin*, the Ninth Circuit, in *Kanne v. Connecticut General Life Insurance Co.*,[41] proclaimed that state common law of contract interpretation does not meet the savings-clause criteria of ERISA necessary to escape preemption.[42] The Ninth Circuit affirmed this principle after *Kunin* when the court explained that the need for a uniform body of federal common law precludes the application of state contract law.[43] Despite this general language limiting the effect of state common law on ERISA contract interpretation, the Ninth Circuit did not explicitly include the *contra proferentem* rule among those state common law precepts that could not be applied to

38. 489 U.S. 101 (1989).

39. *Id.* at 111-12.

40. *See* Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150, 153-54 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2872 (1991) (following the language in *Bruch* to find the rule of *contra proferentem* gives improper deference to one party); Chambers v. Prudential Ins. Co. of Am., 776 F. Supp. 1166, 1169 (S.D. Miss. 1991) (deciding trust principles in *Bruch* require inapplicability of the *contra proferentem* rule). *But see* Phillips v. National Life Ins. Co., 978 F.2d 302, 311-12 (7th Cir. 1992) (declining to follow dicta in *Bruch*); Kunin v. Benefit Life Ins. Co., 901 F.2d. 534, 540-41 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991) (same).

41. 867 F.2d 489 (9th Cir. 1988) (per curiam), *cert. denied*, 492 U.S. 906 (1989).

42. *Id.* at 494. In *Kanne*, the Ninth Circuit faced, among other issues, the question of whether ERISA preempted the plaintiffs' claim for reimbursement of transportation costs. *Id.* This claim was "premised on the interpretation of their insurance contract." *Id.* Since the common law of contract interpretation does not regulate the business of insurance, the court found that the claim was preempted. *Id.*; *see supra* note 37 and accompanying text (discussing the Supreme Court's analysis of the savings clause). Nowhere in the court's opinion does it specify what precept of common law contract interpretation plaintiffs had invoked. Thus, it is impossible to determine whether the court was referring to the rule of *contra proferentem*.

43. Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1440-41 (9th Cir. 1990) (per curiam). This case, while holding that federal courts should not pick and choose varying common law doctrines of contract interpretation from different states, did not address whether the *contra proferentem* rule should be a part of federal common law. *Id.* The court did not need to reach this issue because it found the contested term to be unambiguous. *Id.* at 1441.

ERISA cases.[44] In *Brewer v. Lincoln National Life Insurance, Co.*,[45] however, the Eighth Circuit explicitly rejected the rule, holding that ERISA preempts it and that the spirit of *Bruch* requires that courts not defer to either party.[46]

Still, the *Kunin* court is not alone in applying the *contra proferentem* rule to ERISA plans.[47] The Second Circuit employs the rule of *contra proferentem* when the court reviews de novo a denial of benefits under ERISA insurance plans.[48] Even after *Brewer*, the Eighth Circuit used the rule in an ERISA case when extrinsic evidence failed to resolve an ambiguity in the plan.[49] The experience of courts in determining when and

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44. *Id.* at 1440-41; *Kanne*, 867 F.2d at 494.

45. 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2872 (1991).

46. *Id.* at 153-54; *see supra* notes 38-40 and accompanying text (discussing *Bruch*); *see also* McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426, 429-30 (6th Cir. 1989) (holding that, under the McCarran-Ferguson criteria, the rule of *contra proferentem* does not regulate insurance and therefore is not saved from preemption).

The *Brewer* court apparently elected not to incorporate the rule through the federal common law, as the *Kunin* court did. *See* Kunin v. Benefit Life Ins. Co., 901 F.2d. 534, 540-41 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991). Despite preemption, *Brewer* could have held that the rule, in its form as a state law principle, was consistent with federal policy.

Some courts recognize the possibility that the *contra proferentem* rule could be applied to insurance contracts governed by ERISA but not to other ERISA plans that are self-funded, such as severance pay plans. *See, e.g.*, Allen v. Adage, Inc., 967 F.2d 695, 701 n.6 (1st Cir. 1992); Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227, 1233-34 (3d Cir. 1991). Indeed, after *Kunin*, the Ninth Circuit did not apply the rule to a self-funded plan that resulted from arm's-length collective bargaining. Eley v. Boeing Co., 945 F.2d 276, 279-80 (9th Cir. 1991).

Some courts before *Bruch* rejected application of the rule to ERISA plans on the ground that, since the plan administrator interprets the terms of the plan, ambiguous language should be controlled by the administrator's interpretation. *See* DeGeare v. Alpha Portland Indus., Inc., 652 F. Supp. 946, 960-61 (E.D. Mo. 1986), *aff'd*, 837 F.2d 812 (8th Cir. 1988), *vacated sub nom.* DeGeare v. Slattery Group, Inc., 489 U.S. 1049 (1989) (vacating in accord with *Bruch*).

47. *See, e.g.*, Phillips v. National Life Ins. Co., 978 F.2d 302, 311-13 (7th Cir. 1992); DiDomenico v. Employers Coop. Indus. Trust, 676 F. Supp. 903, 908 (N.D. Ind. 1987); Bonar v. Barnett Bank, 488 F. Supp. 365, 369 (M.D. Fla. 1980).

48. Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 107 (2d Cir. 1991). In *Masella*, the court noted that without the *contra proferentem* rule, beneficiaries would enjoy less protection than before the passage of ERISA, and that the rule is consistent with trust law which aims to protect the beneficiary. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959)).

49. Delk v. Durham Life Ins. Co., 959 F.2d 104, 105-106 (8th Cir. 1992) (per curiam). *Delk* appeared to limit *Brewer*'s holding, which does not apply the rule, to the situation where the ambiguous language of an ERISA insurance plan can be interpreted with extrinsic evidence. *See id. But see* Maxa v. John Alden Life Ins. Co., 972 F.2d 980, 985 (8th Cir. 1992) (summarily dispatching with the *contra proferentem* rule as preempted state law that violates ERISA).

whether to apply the rule demonstrates the confusion and controversy surrounding this issue.[50]

Courts that reject *contra proferentem* in ERISA cases tend to interpret the preemption clause broadly to strengthen federal uniformity, while viewing the rule as unnecessary for interpreting contract terms.[51] Conversely, courts that apply the rule employ it to further the interests of employees who should enjoy ERISA protections and to place the costs of ambiguous terms on insurers.[52]

Courts have developed a body of federal common law supporting and interpreting ERISA.[53] The Ninth Circuit in *Kunin* as well as other courts have incorporated the rule of *contra proferentem* into this growing body of law.[54] These courts either have pronounced the rule to apply to ERISA as a matter of uniform federal common law,[55] or have applied the rule as a state precept.[56] Either way, the ultimate concern of these courts is that the federal common law coincide with the lan-

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50. The Eighth Circuit appears inconsistent in recent decisions, reaching contrary results in two similar cases. *See supra* note 49 and accompanying text (discussing two cases that imply different understandings of the rule in the ERISA context). The existence of different panels within a circuit reaching inconsistent decisions on this issue highlights the controversy. The Tenth Circuit has refused to address this issue by expressly taking no position on whether the rule should apply to ERISA contracts. McGee v. Equicor Equitable HCA Corp., 953 F.2d 1192, 1200 (10th Cir. 1992).

51. *See* Allen v. Adage, Inc., 967 F.2d 695, 701 (1st Cir. 1992); *Taylor*, 933 F.2d at 1233; *Brewer*, 921 F.2d. 150, 153; *McMahan*, 888 F.2d. at 429-30.

52. *See Phillips*, 978 F.2d at 311-12; *Masella*, 936 F.2d at 107.

53. *See Bruch*, 489 U.S. 110; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987). The replacement of diverse state laws regulating employee benefit plans by uniform federal law was cited by the *Dedeaux* court as a driving policy behind the enactment of ERISA. "The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." *Id.*

54. The Eighth Circuit views state common law regarding ERISA potentially to apply in a case unless the law is contrary to the provisions of ERISA. *Brewer*, 921 F.2d at 153; Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989). According to the *Brewer* court, the rule of *contra proferentem* violates ERISA. 921 F.2d at 153.

55. *See, e.g., Phillips*, 978 F.2d at 311 (declaring the rule of *contra proferentem* should be applied as a principle of federal common law); *Masella*, 936 F.2d at 107 ("[W]e believe that application of this rule of interpretation to de novo review of ERISA insurance plans is an appropriate implementation of the congressional expectation that the courts will develop a 'federal common law of rights and obligations under ERISA-regulated plans.' ").

56. *E.g.*, DiDomenico v. Employers Coop. Indus. Trust, 676 F. Supp. 903, 908 (N.D. Ind. 1987) (applying Indiana rule of *contra proferentem* to ERISA plan). Besides the *contra proferentem* rule, a federal court could borrow other

guage and the employee-protection policies underlying ERISA.[57]

II. *KUNIN*'S CONTRIBUTION TO THE LAW

Against the backdrop of uncertain precedent and the looming preemption clause of ERISA, the Ninth Circuit in *Kunin v. Benefit Trust Life Insurance Co.*[58] squarely addressed whether courts should apply *contra proferentem* in construing ERISA insurance contracts. The court faced not only significant legal issues, but also the very human problem of disputed coverage for the medical expenses incurred by a child's autism. Treatment of Alex Kunin's autism cost over $50,000.[59] If the court were to construe autism as a "mental illness," the Kunin family would be responsible for over $40,000 worth of these expenses, because the insurance contract limited disbursements for mental illness claims to $10,000.[60]

The ERISA plan at issue in *Kunin* involved a group health insurance policy purchased by Kunin's employer, and insured and administered by Benefit Trust.[61] The district court relied on expert testimony establishing that autism is an organic affliction. As such, it could not be defined as mental illness,

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state common law contract principles. *See* Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501-1502 (9th Cir. 1985).

57. *Phillips*, 978 F.2d at 311. As outlined in United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979), courts generally consider whether the federal program or law requires uniformity, whether state law impedes the relevant federal statute's specific objectives, and the extent to which application of a federal rule would disrupt commercial relationships based on state law before incorporating state common law to decide a question rooted in a federal program. In *Kunin v. Benefit Trust Life Insurance Co.*, the court found satisfaction of the *Kimbell Foods* test to be superfluous, since the rule of *contra proferentem* already applied throughout the country. *See infra* Part III.A.4 (discussing how the *Kunin* court could have employed the *Kimbell Foods* test).

58. 910 F.2d 534 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991).

59. *Id.* at 535.

60. *Id.* Young Alex Kunin received treatment for approximately 30 days at a neuropsychiatric hospital in Los Angeles. *Id.* Alex's father, upon submitting a claim for coverage to Benefit Trust, was informed that, based on the recommendation of its medical director, autism was a mental illness and therefore benefits were limited to $10,000. *Id.* The medical director, Dr. Zolot, apparently came to his conclusion after talking with three psychiatrists and reading a textbook definition of "autism." *Id.*

61. *Id.* Thus, the plan was not self-funded, avoiding preemption on the basis of the deemer clause as prescribed by the later decision of the Supreme Court in FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990).

which is driven by environmental conditions.[62] Finding that autism is not a mental illness, the district court held that Benefit Trust acted in an arbitrary and capricious manner in denying benefits, and ordered it to provide the Kunins full coverage.[63]

The Ninth Circuit first held that the district court correctly found Benefit Trust's denial of benefits to be arbitrary and capricious.[64] The essential basis for its holding was that Benefit Trust behaved unreasonably in failing to investigate adequately whether autism should be considered a mental illness.[65] Given the weight of expert evidence indicating that autism is not a mental illness, the court found that Benefit Trust's cursory analysis was insufficient.[66]

While the court could have concluded its opinion at this point, it added a second, alternative holding. Finding "mental illness" to be ambiguous on a plain reading of the policy, the court applied the rule of *contra proferentem* against Benefit Trust.[67] The court was especially concerned that the contract lacked language to aid an insured in determining the meaning of "mental illness."[68]

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62. *Kunin*, 910 F.2d at 536. The Eighth Circuit in Brewer v. National Life Insurance Co., 921 F.2d 150, 154, *cert. denied*, 111 S. Ct. 2872 (1991), concluded that expert testimony defining "mental illness" in an ERISA plan violated the principle that terms should be given their ordinary meaning as understood by a layperson.

> An "autistic child" can be defined as:
>
> a child who has lost or never achieved contact with other people and is totally withdrawn and preoccupied with his own fantasies, thoughts, and stereotyped behavior such as twirling objects or rocking. Other characteristics are indifference to parents or other people, inability to tolerate change, and defective speech or mutism. The condition is interpreted by some as organically based, and others as a form of schizophrenia.

LONGMAN DICTIONARY OF PSYCHOLOGY AND PSYCHIATRY 76 (Robert M. Goldenson ed., 1984).

63. 910 F.2d at 536.

64. *Id.* at 538.

65. *Id.*

66. *Id.*

67. *Id.* The court found the term to be ambiguous because it was susceptible to different interpretations. *Id.* at 539 (discussing finding ambiguity). The court apparently did not use extrinsic evidence in making this determination. *See supra* notes 17-18 and accompanying text (noting the different manifestations of the rule depending on the use of extrinsic evidence); *cf.* Delk v. Durham Life Ins., Co., 959 F.2d 104, 105-06 (8th Cir. 1992) (per curiam) (applying the rule after extrinsic evidence failed to clarify an ambiguous term in an ERISA plan).

68. *Kunin*, 910 F.2d at 541. The court reasoned that:

> In light of the drafters' expertise and experience, the insurer should

To reach the holding that the *contra proferentem* rule should apply to ERISA insurance plans, the court needed to contend with three legal challenges: ERISA's preemption clause, the Supreme Court's decision in *Bruch*, and the problems of fashioning *contra proferentem* into a federal rule. With regard to preemption, the Ninth Circuit explained that "this is not a preemption case."[69] The court's opinion sheds little light on the reasoning behind this assertion, despite some discussion of the preemption issue.[70] The court apparently inferred that Congress intended the rule to apply to ERISA plans as a matter of federal law.[71]

In contrast to its cursory analysis of the preemption issue, the court carefully considered language in *Bruch*, stating that courts should afford neither party deference in interpreting the terms of an ERISA plan.[72] The *Kunin* court applied a narrow reading of *Bruch* and held that it did not abolish the rule of

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be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.

Id. at 540.

This rationale for applying the rule of *contra proferentem* accords with historical reasons for the rule. *See supra* notes 12-16 and accompanying text (explaining purposes behind the rule that enforce responsibility for the ambiguous language of a contract on the more sophisticated party).

69. *Kunin*, 910 F.2d at 539 n.8.

70. *Id.* While the court implied in the footnote that *contra proferentem* could fall within the savings clause, the court did not explicitly base its holding on savings clause analysis, explaining "this court and others have had some difficulty in determining when a law 'regulates insurance' for the purpose of this . . . analysis." *Id.* The usual preemption analysis is absent in *Kunin*. The court mentioned Kanne v. Connecticut General Life Insurance Co., 867 F.2d 489 (9th Cir. 1988) (per curiam), but it did not attempt to reconcile its holding in *Kanne* with the case at hand. *Kanne* proscribed application of state common law of contract interpretation to ERISA cases, while *Kunin* held that the *contra proferentem* rule is not preempted. *Kunin*, 910 F.2d at 539 n.8. The *Kunin* court, however, did note that Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 746-47 (1988), recognizes the intention of Congress to leave intact "*some* state laws regulating insurance contracts . . . even though they may also 'relate to' ERISA plans." *Kunin*, 910 F.2d at 539 n.8.

71. *See* Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (9th Cir. 1991); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 107 (2d Cir. 1991). *But see* Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150, 153 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2872 (1991); McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426, 429-30 (6th Cir. 1989) (finding that the *contra proferentem* rule does not regulate the insurance industry for the purpose of the savings clause and is contrary to the provisions of ERISA).

72. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111-12 (1989); *see Brewer*, 921 F.2d at 153-54.

contra proferentem in ERISA cases.[73] The *Kunin* court explained that *Bruch* did not explicitly preclude courts and administrators from using canons of construction to interpret contracts governed by ERISA.[74] In addition, the court drew a distinction between deferring to a particular party's interpretation and using a presumption in favor of a party to reach the proper interpretation.[75] *Bruch* permitted courts to use a presumption, like the *contra proferentem* rule, because it deferred to a particular party's preferred interpretation only as a tie-breaking measure. Moreover, the court stated that *Bruch* expressly recognized that "[t]he trust law de novo standard of review" is consistent with the contract principles courts used to interpret terms of employee benefit plans before the enactment of ERISA.[76] Because prior to ERISA, courts employed the *contra proferentem* rule to such plans, the *Kunin* court stated that the Supreme Court in *Bruch* "intended no wholesale rejection of prevailing principles of plan interpretation when it looked to trust law on the subject of the appropriate standard of judicial review."[77]

Finally, in determining how to apply the rule of *contra proferentem* through federal law, the Ninth Circuit reserved the question of whether the rule should be made a part of uniform federal common law or should be incorporated from state law to apply to ERISA.[78] The court decided the rule could apply through either means.[79] Because every state applies the rule to insurance contracts, the Ninth Circuit decided not "to controvert an opinion held with such unanimity in the various states and to adopt a contrary view as the federal rule."[80] The court also noted that factors usually leading states to apply the

73. *Kunin*, 910 F.2d at 541.

74. *Id.*

75. *Id.* The court drew two analogies to support its distinction. First, while a criminal jury cannot defer to the defendant's plea of "not guilty," it must still presume his innocence. *Id.* Second, a baseball umpire cannot defer to the runner's claim that he is safe, but can use the rule of "tie goes to the runner." *Id.*

76. *Id.* (quoting *Bruch*, 489 U.S. at 112).

77. *Id.*

78. *Id.* at 539-40. The court in discussing the incorporation of state law into federal law took notice of the test stated in United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979). The court concluded, however, that application of the *Kimbell Foods* test was unnecessary and did not control. *Kunin*, 910 F.2d at 539-40.

79. *Kunin*, 910 F.2d at 540.

80. *Id.* Like the court's handling of the preemption issue, its discussion of the federal law questions does not include a clear explanation of its reasoning.

contra proferentem rule were present in *Kunin*: the insurance plan did not result from collective bargaining, and it was written solely by Benefit Trust.[81]

The Ninth Circuit in *Kunin* attempted to resolve the tensions arising from the divergent legal principles relating to ERISA and insurance contracts. The court's holdings, particularly that involving the rule of *contra proferentem*, could have important implications for the future.[82] On a practical level, consistent application of the rule could encourage insurance companies to draft clearer policies and increase the cost of coverage for insurers. More theoretically, applying the rule may limit the scope of ERISA's preemption clause, and perhaps ultimately undermine ERISA's concern for national uniformity. At the same time, however, *Kunin* suggests how applying the rule may further ERISA's principles of employee protection.

III. THE GOOD INTENTIONS AND FLAWED REASONING OF *KUNIN*

A. A CRITIQUE OF *KUNIN*

The Ninth Circuit in *Kunin* acted quite boldly to reach an equitable result by applying the rule of *contra proferentem* to the Kunins' ERISA plan. The persuasive power of the court's holding, however, is undermined by reasoning that fails to address squarely a number of the case's key issues.

1. Finding Ambiguity

The Ninth Circuit reviewed the trial court's finding of ambiguity de novo, concluding that the term "mental illness" was ambiguous on its face.[83] Certainly, the words "mental illness," left undefined, are susceptible to varying but equally reasonable interpretations.[84] The court, without reference to extrinsic evidence, held that the term was ambiguous.[85]

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81. *Id.*

82. The amici curiae appearances by the Health Insurance Association of America and the American Council of Life Insurance on behalf of Benefit Trust demonstrate the interest the case attracted and the significant potential impact of the decision. *See id.*

83. *Id.* at 541.

84. *See* WINDT, *supra* note 12, § 6.02, at 288.

85. *Kunin*, 910 F.2d at 541. The court's finding of ambiguity, however, was not without apparent confusion. The court found the term to be ambiguous on its face, which could have been enough to require automatic application of the *contra proferentem* rule under its most mechanical manifestation. *Id.* Yet the court noted the opinions of experts testifying on behalf of Kunin. *Id.*

A sounder application of the *contra proferentem* rule, however, would involve the use of extrinsic evidence to ascertain the parties' intent or to dispel a term's ambiguity before turning to the rule.[86] Thus the words and conduct of the bargaining parties themselves, and not the court, would explain the contract's meaning. By first evaluating extrinsic indicators of intent, such as the course of dealing between the parties and customs and usages within the industry, the court would have made use of the rule truly a last resort.[87] The *Kunin* court's failure to consider extrinsic evidence (or at least to address whether extrinsic evidence should be used to ascertain intent) prevented it from fully exploring the appropriateness of applying the rule in this case.

2. The Court's Preemption Analysis

The *Kunin* court declared that it was not faced with a preemption case.[88] By doing so, however, the court ignored important precedent, even within the Ninth Circuit, pointing toward preemption.[89] The court may have inferred that, because, in its view, the rule of *contra proferentem* should be a part of federal law, *ipso facto* ERISA should not preempt it.[90] Still, by not acknowledging the body of ERISA preemption law, the court ap-

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While extrinsic evidence, like expert testimony, may be examined to *clarify* the meaning of an ambiguous term to prevent application of the rule, the court examined this expert testimony to *support* a determination of ambiguity. *Id.* The court was not compelled to weigh expert evidence to support its finding of ambiguity, and merely clouded its reasoning by doing so.

86. At least one eminent commentator agrees that the rule should be applied only after extrinsic evidence is examined to provide insight into the meaning of an ambiguous term. *See* WINDT, *supra* note 12, § 6.02, at 282-83. *Kunin* cites Windt's language but appears to ignore its mandate to use the rule as a last resort. 910 F.2d at 539. As noted by Professor Farnsworth, courts are free to ascertain the meaning of ambiguous terms, as understood by the parties, through the use of such "extrinsic aids" as evidence of prior negotiations, course of dealing, course of performance, or usage. E. ALLAN FARNSWORTH, CONTRACTS § 7.10, at 511 (1990). Such evidence should be used to provide an ambiguous term with a meaning that it can reasonably hold; extrinsic evidence should be disallowed when it contradicts or supplements the term in question. *See id.* § 7.12, at 527. Commentators critical of the rule grudgingly conclude that if extrinsic evidence fails to clarify the term in question, then the rule should be applied. *See e.g.*, Benz, *supra* note 21, at 77; Miller, *supra* note 11, at 1868.

87. In cases where the insurance company is truly the sole drafter of the terms, however, the availability of helpful extrinsic evidence seems unlikely.

88. 910 F.2d at 539 n.8.

89. *See* Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 494 (9th Cir. 1988).

90. *Kunin*, 910 F.2d at 540.

pears to have knowingly ignored an analysis damaging to its holding or at least to have misunderstood the preemption issue.

This inattention is particularly troubling because a formidable argument can be advanced that ERISA should preempt the *contra proferentem* rule. In *Brewer v. Lincoln National Life Insurance, Co.*,[91] the Eighth Circuit held that the *contra proferentem* rule is a general principle of state contract law that affects employee benefit plans and, therefore, that the rule is subject to preemption.[92] ERISA's savings clause does not preserve the rule because, in the Eighth Circuit's view, *contra proferentem* does not "regulate the insurance industry."[93] Therefore, as a "state law" that does not regulate insurance, the broad sweep of the preemption clause dictates that the *contra proferentem* rule cannot apply to ERISA plans.[94]

Despite this persuasive case for preemption, the *Kunin* court properly held that the *contra proferentem* rule should apply to at least some ERISA contracts. In determining whether ERISA preempts a state law, the ultimate inquiry should focus on whether Congress intended preemption.[95] By applying the *contra proferentem* rule as a matter of federal law, the *Kunin* court implied that Congress did not intend to provide less protection to an insured under an ERISA plan than he enjoyed under state common law prior to the passage of ERISA.[96] The purposes of ERISA, as found in the statute and as interpreted by courts, clearly demonstrate that Congress intended to buttress the rights of employees and their beneficiaries under a

91. 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2872 (1991).

92. *Id.* at 153. The Eighth Circuit apparently viewed the rule as inconsistent with the policies behind ERISA, thereby preventing it from coming back into the federal common law.

93. *Id.* In the Eighth Circuit's view, the savings clause exempts from preemption only state laws that regulate insurance; that is, laws that spread policyholder risk, make up an integral part of the relationship between the insured and insurer, and apply only to the insurance industry. Because the court viewed the rule as a general rule of contract construction, it was not specifically designed to regulate the insurance industry nor does it spread policyholder risk. *Id.*

94. *Id.* Even the Ninth Circuit imposed a potential limitation on the application of the *contra proferentem* rule. *See* Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 494 (9th Cir. 1988). By holding that ERISA preempts unspecified state common-law principles of contract interpretation, *id.*, *Kanne* logically could require preemption of the rule. The court in *Kunin* was silent as to this possibility.

95. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

96. *See* Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 107 (2nd Cir. 1991); *see supra* notes 27-29 and accompanying text (describing the purposes behind ERISA).

uniform scheme.[97] Applying the *contra proferentem* rule thus fulfills Congressional intent.

In addition, while the *Kunin* court did not undertake an analysis of ERISA's savings and deemer clauses,[98] the court could have relied on them to save the rule from preemption. In *Metropolitan Life Insurance Co. v. Massachusetts*,[99] the Supreme Court concluded that "the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause."[100] As a state law identified primarily as a rule regulating insurance contracts,[101] it follows that the *contra proferentem* rule should be saved from preemption.[102] This interpretation of ERISA complies with the common-sense requirement in preemption case law, because the rule plainly regulates insurance contracts.[103]

Furthermore, the other criteria cited in ERISA case law describing "insurance" for the purpose of the savings clause[104] do not foreclose application of the rule as *Brewer* suggests.[105] Indeed, properly analyzed, the rule survives application of the considerations employed by the Eighth Circuit in *Brewer*[106] and by the Supreme Court in ERISA preemption cases.[107] First, the rule effectively transfers or spreads an insured's risk by making coverage more likely when the policy contains ambiguous terms. Second, the rule has served a longstanding and important role in balancing the relationship between the insurer and the insured. Third, the rule, while not exclusively limited to insurance contracts, has evolved to be identified particularly

97. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113-14 (1989).

98. *See supra* note 33 (providing the language of the clauses).

99. 471 U.S. 724 (1985).

100. *Id.* at 741.

101. *See supra* notes 11-16 and accompanying text (outlining the history of the rule as applied to insurance contracts).

102. *Kunin* does mention that the enactment of the savings clause by Congress indicates an intent to allow some state laws that relate to ERISA plans to escape preemption. Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 539 n.8 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991).

103. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985).

104. *See Dedeaux*, 481 U.S. at 48-49.

105. *See* Brewer v. Lincoln Nat'l Life Ins. Co., 867 F.2d 150, 153 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2872 (1992).

106. *Id.*

107. *See, e.g., Dedeaux*, 481 U.S. at 48-49; *Metropolitan Life*, 471 U.S. at 743.

with insurance contracts.[108]

As a widely used common-law rule that gives the benefit of the doubt to employees, *contra proferentem* supports the purposes of ERISA and arguably fits within ERISA's savings clause. Therefore, the *Kunin* court arrived at the best result in deciding not to preempt the rule of *contra proferentem*. The court's opinion suffered, however, from a failure to recognize and distinguish the contrary case law, and to explore fully how the rule serves the purposes and language of ERISA. As a result, the Ninth Circuit's analysis is weaker than it needed to be.

3. The Application of *Bruch*

The Ninth Circuit's treatment of the Supreme Court decision in *Firestone Tire & Rubber Co. v. Bruch*[109] essentially involved sound analysis of what was, in fact, a relatively narrow holding. The *Bruch* rule was not meant to stand as a comprehensive umbrella covering all cases touching ERISA. *Bruch* simply held that, based on the principles of trust law, a decision by a plan administrator or trustee, where the governing plan does not provide for discretion to determine eligibility for benefits or to construe plan terms, should be reviewed de novo.[110] The context of the Supreme Court's statement regarding undue deference to a particular party's interpretation of a plan under ERISA militates against using it to strike down the *contra proferentem* rule. The Court made the statement while indi-

108. No cases applying the rule to ERISA plans undertake the analysis of the McCarran-Ferguson criteria for a practice regulating insurance. A significant argument, however, can be asserted that the rule does regulate insurance. *See supra* notes 11-16 and accompanying text (outlining application of the rule to insurance contracts).

In any event, a finding that the rule meets the McCarran-Ferguson criteria does not stretch the criteria's meaning substantially more than the analysis of the mandated-benefit law in *Metropolitan Life*, 471 U.S. at 744, which escaped preemption as a law that regulated insurance. Indeed, there is no suggestion in the legislative history of ERISA "that the pre-emption provision was broadened out of any concern about state regulation of insurance contracts," except to the extent such state laws may conflict. *Id.* at 745 n.23. The application of the rule, as a common-law rule shared among the states, would not cause conflict.

The strongest argument against saving the rule from preemption is that the rule cannot be viewed to apply exclusively to the insurance industry because it applies to contracts other than insurance policies. *See Dedeaux*, 481 U.S. at 51 (finding that a state law of bad faith most commonly associated with the insurance industry fails the test of exclusivity for the purpose of savings-clause analysis because the bad faith law applies generally to all contracts).

109. 489 U.S. 101 (1989).

110. *Id.* at 115.

cating that an interpretation or decision by a plan administrator inherently does not deserve the deference of judicial review under the arbitrary and capricious standard.[111] Thus, the Court was implicitly limiting the power of insurers and employers, and protecting employees and beneficiaries when discretionary language was absent from the plan. The *Bruch* Court's concern was that applying the arbitrary and capricious standard to a denial of benefits when an ERISA plan did not give the administrator discretion, "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted."[112] Therefore, the dicta in *Bruch* that courts have invoked to strike down application of the rule to ERISA plans actually could be interpreted to support the *Kunin* court's concern for the employees' interests.[113]

The *Kunin* court also duly recognized that *Bruch* took contract principles into account in its holding.[114] *Bruch* expressly asserted that the trust law de novo standard of review is consistent with law prior to ERISA, when contract principles governed employee benefit plans.[115] Because the *contra proferentem* rule applied to such plans prior to ERISA, *Bruch* implies that its holding would not be contrary to the rule. Even if *Bruch* could be read to apply only trust law to ERISA plans, the rule as applied through trust law conceivably could be employed against the insurer when doubts arose as to the plan's language.[116]

Finally, the Ninth Circuit in *Kunin* persuasively distin-

111. *Id.* at 114.

112. *Id.*

113. The language used by the Court in *Bruch* underscores that it did not contemplate striking down the *contra proferentem* rule: "*As they do with contractual provisions*, courts construe terms in trust agreements without deferring to either party's interpretation." *Id.* (emphasis added). Presumably, the Court was aware that courts frequently applied the rule to contracts. By adding the emphasized clause, the Court could not have meant that the rule involved deferring to either party's interpretation. Otherwise, the sentence makes little sense.

114. Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 541 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991).

115. *Bruch*, 910 F.2d at 112.

116. *See* Brenneman v. Bennet, 420 F.2d 19, 24 (8th Cir. 1970) (construing ambiguous terms in a trust instrument against the drafter). The Eighth Circuit in Brewer v. Lincoln National Life Insurance, Co., 921 F.2d 150 (8th Cir. 1990), apparently did not recognize this intra-circuit case in deciding that trust principles forbade application of the *contra proferentem* rule. *See id.* at 153-54; *see also* RESTATEMENT OF TRUSTS § 170(1) (1959) (stating that trust property should be handled for the benefit of the beneficiary).

Thus, if trust law exclusively governs ERISA plans as suggested by *Bruch*,

guished deference to a party's interpretation of an ambiguous term, at issue in *Bruch*, from a presumption in favor of a party.[117] The *contra proferentem* rule applies only when the parties' interpretations are no longer helpful in explaining the meaning of an ambiguous term, and thus does not defer to a party during the process of interpretation.[118] In effect, *contra proferentem* does not interpret a contract but rather constructs it in the fairest possible way after all other interpretive attempts have failed.

4. Does *Kunin* Make the *Contra Proferentem* Rule Federal Law?

By failing to decide whether the *contra proferentem* rule should apply to ERISA plans as a matter of incorporating a state rule or under uniform federal common law,[119] the *Kunin* court unnecessarily created a legal question that it later was forced to answer.[120] The *Kunin* court claimed that the rule would control as a matter of federal law under either theory.[121] Despite the court's ambivalent treatment of this issue, it acted properly, because Congress intended courts to create federal common law to fill the gaps of ERISA.[122] The court did not need to be concerned with incorporating state law because the mandate for a uniform system of law under ERISA permitted the court to establish any federal rule that did not violate the federal statute.[123]

Still, the court could have attempted to apply the rule as an incorporated state law through the test outlined by the Supreme Court in *United States v. Kimbell Foods, Inc.*[124] According to *Kimbell Foods*, a state law cannot be interpreted as applying to a federal program if its application would under-

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the *contra proferentem* rule arguably could still apply when terms are ambiguous.

117. *See Kunin*, 910 F.2d at 541.

118. *Id.*

119. *See id.* at 540.

120. *See* Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1440-41 (9th Cir. 1990) (per curiam) (determining that uniform federal common law controls).

121. *Kunin*, 910 F.2d at 540.

122. *See* Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (9th Cir. 1992); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 107 (2d Cir. 1991).

123. If the rule is viewed as a "state law" relating to an employee benefit plan not saved by the savings clause of ERISA, its preemption obviously would follow. Judicial sleight of hand, however, can circumvent preemption by calling the rule a federal rule consistent with the purpose of ERISA. *See, e.g.*, *Kunin*, 910 F.2d at 540.

124. 440 U.S. 715, 728 (1979).

mine the uniformity of the federal scheme or frustrate federal objectives.[125] Conversely, *Kimbell Foods* states that a uniform federal rule is not appropriate if it would disrupt existing commercial relationships based on state law.[126]

In *Kunin*, a uniform federal rule of *contra proferentem* would have little disruptive effect on commercial expectations because businesses have traditionally operated under the rule as a matter of state law.[127] In addition, incorporation of the rule as a matter of state law would also meet the *Kimbell Foods* requirements. Because every state recognizes the rule in some form, incorporating it would not endanger the uniformity required by ERISA. Similarly, applying the rule would further, rather than frustrate, the ERISA goal of uniformly protecting the interests of employee benefits packages. The Ninth Circuit decided not to incorporate the rule as a state common-law principle, but, as this analysis suggests, a discussion of the *Kimbell Foods* factors could have buttressed the court's determination that the rule should apply to ERISA plans.

In sum, *Kunin* achieved a reasonable outcome that relied on common law not tailor-made for evaluating ambiguity in ERISA plans. Although ERISA and pertinent case law could be read to mandate application of the rule, the overwhelming complexity of ERISA, with its preemption clause and multi-faceted governance, makes any blanket recommendation difficult. To apply the rule reflexively to all ERISA plans would ignore the diverse and unique arrangements that ERISA covers. Some plans may be better suited to *contra proferentem* than others, depending upon the balance between the purposes of the rule and the goals of ERISA. The court in *Kunin* accomplished what it could, but it failed to articulate in a satisfying manner why and when the rule should apply. The following proposals provide alternative guides for applying the rule to different ERISA plans.

B. ALTERNATIVE PROPOSALS TO CONSTRUING TERMS AGAINST THE INSURER

This Comment proposes to apply the rule of *contra proferentem* to ERISA plans while recognizing the diversity of agreements that ERISA governs. The different manifestations of ERISA plans, coupled with the existing body of preemption

125. *Id.*
126. *Id.* at 729.
127. *See supra* notes 13-14 and accompanying text.

law, make wholesale application of the rule to all ERISA contracts a challenging and potentially inappropriate chore. This Comment proposes that courts apply the rule only in particularly appropriate circumstances. As an alternative, second proposal, Congress could settle the matter by amending ERISA to permit courts to construe ambiguous terms in the best interest of the employee or beneficiary.

1. Application of the Rule, and Consideration of Extrinsic Evidence, Should Depend upon the Type of ERISA Plan

A number of considerations are important for justifying the application of the *contra proferentem* rule to ERISA plans. Was the insured sophisticated? If a sophisticated employer purchased group insurance for employees, was the contract a result of collective bargaining with employee representation? If the plan is self-insured, did the employees collectively or individually bargain its terms? Was extrinsic evidence available to show the parties' intent as to the meaning of the ambiguous term? Of course, these questions must be answered in the context of ERISA's purposes and provisions. Depending on the circumstances of the contract, the *contra proferentem* rule may be applied immediately or as a last resort, and in some cases, application of the rule may be inappropriate.

a. The Unsophisticated Individual Insured

While an ERISA plan rarely involves an insurance contract directly between the insurer and the insured individual,[128] addressing this relationship puts the rest of this proposal in context. If such a case arises, the *contra proferentem* rule should mandate that ambiguous terms be construed against the insurer.[129] The rule should only be employed, however, after consideration of extrinsic evidence to ascertain intent. In those situations where extrinsic evidence does not exist or would not be helpful, application of the rule would be proper simply on finding ambiguity.

For example, where the employee, or insured, deals directly with the insurer without the benefit of legal representa-

128. To be covered by ERISA, a plan generally is established and maintained by an employer, an employee organization, or both. *See* 29 U.S.C § 1002(1) (1988).

129. *See supra* notes 11-12 and accompanying text (citing a variety of sources to support application of the rule in this context).

tion or special resources, the resulting writing would bear strong resemblance to a traditional adhesion contract. In this instance, evidence of bargaining, negotiation, and shared creation of terms would be absent or of little use due to the difference in bargaining power between the parties. Many judges in such cases have applied the rule to insurance contracts without examining extrinsic evidence because searching for such evidence when the insurer is solely responsible for drafting the document is a futile endeavor. The only evidence of an agreement are the terms themselves, so any ambiguity leaves a court without alternate interpretive methods. Therefore, when terms are not negotiated and the bargaining leverage is significantly unequal between the employee and the insurer, applying the rule in ERISA cases would conform to the rule's history and rationale. In theory, courts should always consider extrinsic evidence before applying the rule, but reality suggests that examining extrinsic evidence in these types of cases will serve little purpose, and thus courts will likely in practice apply the rule directly.

b. The Unsophisticated Employer

In the purchase of a group policy, an unsophisticated employer has substantially the same characteristics as an individual insured. Extrinsic evidence to clarify an ambiguous term likely would be sparse if the employer accepted the terms of a form contract without negotiation or bargaining. Like an individual insured faced with a skilled, well-resourced insurance company, an employer may remain vulnerable, to the point that application of the rule makes sense. The *contra proferentem* rule's spirit of fairness and meaningful bargaining supports favoring the insured, despite the fact that the insured employee did not purchase the policy directly from the insurance company. Extrinsic evidence could be considered if available, but would likely shed little light on the contract.

c. The Sophisticated Employer with Collective Bargaining

In other ERISA cases, extrinsic evidence can provide valuable information about the parties' intentions. The information can make the rule a useful last resort in interpreting ambiguous contract terms. Where a sophisticated employer purchases insurance with substantial employee input, as through collective bargaining, the resulting agreement tends to resemble a contract whose terms are negotiated among informed, equal

parties.[130] Although the rule still may apply in such a case, the meaningful give-and-take between the insurer and the insured may yield more direct evidence for ambiguous terms. Put simply, it becomes possible to glean intent on the part of the insured because he expresses his intent by meaningfully participating in the drafting of the plan.

d. The Sophisticated Employer Without Collective Bargaining

A more difficult analysis regarding the purchase of group insurance occurs when the employer-purchaser is sophisticated, but the employees did not undertake any significant bargaining role in the formulation of the insurance contract. Extrinsic evidence may be available to develop the meaning of a term because the employer contributed to the drafting of the plan. The employer, however, may not always act in the best interest of its employees in buying particular coverage.[131] If courts can determine that the employer did bargain in good faith on behalf of its employees, then the consideration of extrinsic evidence to interpret the term accords with the rule's balance between its application as a last resort and its ultimate protection of the insured's interests.[132]

Without any proof that the sophisticated employer bar-

130. In other words, a "sophisticated insured" exception to automatic application of the rule of *contra proferentem* should be accepted in ERISA cases. The Ninth Circuit after *Kunin* decided not to construe automatically ambiguous terms against the insurer when the contract was the result of collective bargaining. Eley v. Boeing Co., 945 F.2d 276, 279 (9th Cir. 1991). This holding accords with *Kunin*'s implication that the rule (in its version that does not require extrinsic evidence) should not apply when the plan is collectively bargained. *See* Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 540 (9th Cir.), *cert. denied*, 111 S. Ct. 581 (1990), *reh'g denied*, 111 S. Ct. 803 (1991).

131. The employer may have a rational self-interest in purchasing clear and adequate coverage for its employees. First, the employer may want to avoid any potential litigation or administrative trouble that unclear terms might bring. Second, the employer may obtain good coverage to retain and attract quality employees. To the extent, however, employers may want to hold down insurance costs and do not share a personal concern for an employee's particular insurance needs, employers may not be expected to always obtain a policy that an employee would purchase.

132. Determining whether an employer sought to purchase a policy in the employee's best interest would prove to be a thorny factual pursuit. Possible considerations could include the amount of effort used to buy the policy, the quality of the coverage, and the history of the employer's treatment of its employees. The difficulty of making this determination, in conjunction with the time required to address this relatively collateral issue, militate against attempting to discern employer motivation absent unusual factual circumstances.

gained on behalf of the employees, a court faces the question of whether considering extrinsic evidence to dispel contract ambiguities is unfair to the employee-beneficiary. Application of the rule in such a case would involve forsaking relevant extrinsic evidence drawn from a significant bargaining relationship in favor of a broader policy of fairness toward the employee-beneficiary. This case exemplifies how the *contra proferentem* rule does not translate comfortably to all ERISA plans.

e. Self-Insured Plans

Because state laws that affect self-insured plans are not saved from preemption by ERISA,[133] application of the *contra proferentem* rule to such plans would require courts to completely ignore the clear mandate for preemption. But, following the lead of *Kunin*, a court could apply the rule as a matter of federal law, rather than state law. The purposes behind the rule, as well as ERISA's general protection of employees, would justify applying the rule to self-insured plans that cannot be explained through the use of extrinsic evidence.[134] Here, as in the aforementioned types of plans, the value of using extrinsic evidence to clarify ambiguous terms depends on whether the employer and employee assumed a significantly equal bargaining relationship, and whether terms were actually negotiated.

133. *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 409 (1990).

134. After all, the employer acts more or less as an insurer, with the potentially same level of resources and expertise as an insurance company. Thus the employer could draw up a form contract that employees essentially must take or leave. The distinction made in preemption analyses between self-insured plans and other ERISA plans does not meaningfully address the application of the *contra proferentem* rule. *See id.* at 409-410.

A policy argument, however, could be advanced that applying the rule to self-insured plans would discourage employers from providing insurance coverage because they would fear the potential costs of ambiguous plans. Moreover, the relationship between employer and employee may not be as adversarial as that between an insurance company and the insured. Despite these considerations running against the rule, the rule should still apply. If plan language is truly ambiguous and extrinsic evidence cannot clarify the language, no alternative exists but to construe the language against the drafter. The requirement of examining extrinsic evidence militates against concerns about reflexive application of the rule. *Cf. Eley*, 945 F.2d at 280 (declining to apply the rule to a self-funded plan resulting from collective bargaining that could otherwise be interpreted with helpful evidence). Furthermore, two purposes behind the rule remain valid in the context of self-insured plans. First, since many employers that can afford self-insurance tend to be large enough to provide a sufficient pool of resources, the sophistication of the employer frequently overshadows the bargaining power of the employee. Second, the language of a self-insured plan may not have resulted from any negotiation, so that the employee would be bound by an adhesion contract.

For example, if a sophisticated union bargained with an employer to create a self-insured plan, extrinsic evidence may foreclose application of the rule. Risk managers or attorneys representing the union and participating in the drafting of the agreement may expect certain interpretations based on industry custom. A longstanding bargaining relationship between the employer and union may produce evidence of a course of dealing or course of performance to clarify terms.

2. An End Run Around the Common Law: Amending ERISA

The above proposal provides a fair guide for how courts can apply the rule of *contra proferentem* in a sensitive fashion. Application of a state common-law rule to cases governed by a sweeping federal statute with a broad preemption provision, however, is still likely to engender some controversy.[135] *Kunin* suggests that a court could effectively bypass some of the obstacles by pronouncing that application of the rule within the federal common law nestles comfortably within the panoply of ERISA law.[136] A better alternative, which would express the clear intent of Congress while dispatching every current obstacle to the rule, would be to amend ERISA.

The amendment could read:

> After considering extrinsic evidence when appropriate to ascertain the meaning of an ambiguous term in a written instrument governed by this statute, an ambiguous term should be construed in the best interest of the employee or beneficiary participating in the plan.

Courts would employ the de novo standard of review when *Bruch* so requires[137] and use the usual common-law methods of

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135. The current disagreement among the federal circuit courts demonstrates the controversy surrounding common-law application of the rule to ERISA cases. *See* notes 46-48 (describing the different ways that circuits have reacted to this question).

136. *Kunin*, 910 F.2d at 539-40; *see* Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (9th Cir. 1992); Masella v. Blue Cross & Blue Shield, Inc., 936 F.2d 98, 107 (2d Cir. 1991).

137. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). *Bruch* requires a court to review a decision by a plan administrator de novo when benefit plan language does not provide the administrator with discretion to interpret the plan. *Id.* A very interesting question is whether inclusion of discretionary language would prohibit a court from finding a term ambiguous, thereby preventing application of the rule. If the term is susceptible to two different reasonable interpretations and therefore ambiguous, a decision to follow the insurer's interpretation by an administrator with discretionary authority may withstand judicial review based on the arbitrary and capricious standard. In other words, if the administrator's interpretation is reasonable,

determining whether terms are ambiguous.[138] Thus, existing challenges in the law related to preemption and *Bruch's* dicta about undue deference would be moot. Because ERISA would plainly endorse construction of ambiguous terms in favor of the insured, courts could not interpret ERISA to preempt this principle. To the extent it suggests otherwise, the dicta in *Bruch* would be superseded. In addition, any concerns about making *contra proferentem* a part of federal common law would be irrelevant in the face of statutory language. Furthermore, self-insured plans would be covered, and in cases where a sophisticated employer purchases a group policy without employee representation, a court would be required to construe an ambiguous term in favor of the beneficiary-employee.[139]

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the court could not find ambiguity and apply the rule. This analysis, however, is somewhat circular. The reasonableness of two interpretations of an ambiguous term may be substantively different than the reasonableness of an administrator's decision to interpret the term to deny benefits. It may be unreasonable for an administrator to accept the insurer's interpretation in every case where an ambiguous term is found. *Bruch* (in its language and application concerning plans without discretionary language) and ERISA would become dead letters if insurers could escape any meaningful judicial review by simply adding a provision in the plan conferring the administrator with discretion to interpret the plan. A judge sits in the same position as an administrator in determining whether plan language is ambiguous, and should have power to review *de novo* plan interpretation. *See* Taylor v. Continental Group Change in Control of Severance Pay Plan, 933 F.2d 1227, 1232 (3d Cir. 1991) (stating that determination of whether a plan term is ambiguous is a question of law). Another alternative would involve requiring plan administrators to apply the rule of *contra proferentem* after using extrinsic aids to attempt to clarify the ambiguity. Both of these suggestions, while in accord with the spirit of ERISA to protect employees, appear to fly in the face of *Bruch*'s implied grant of unreviewable discretion to plan administrators empowered with a discretionary provision. *See Bruch*, 489 U.S. at 115.

138. *See supra* notes 22-25 and accompanying text (describing ways to determine ambiguity).

139. While this Comment has addressed welfare plans under ERISA, the author can think of no reason why pension plans also could not be governed by the amendment. Indeed, pension plans prior to ERISA were construed using usual contract principles.

> Generally, a pension plan should be construed liberally in favor of employees and should be construed against the employer, at least where the employer is the drafter, or where the plan was not negotiated. . . .[I]t has also been held that where such an agreement is ambiguous, matters outside the writing may be considered as an aid to interpretation.

70 C.J.S. *Pensions* § 17 (1987) (footnotes omitted).

Any concerns about disincentives to the formation of pension plans that application of the rule may create are overstated. Extrinsic evidence may be more available with employee input into pension plan language, thereby limiting the frequency of the rule's application. In addition, the benefits of attracting and retaining employees by providing pension benefits would

The rationale for the *contra proferentem* rule supports the amendment. Insurance companies and employers would be encouraged to draft terms of ERISA plans clearly.[140] If such clarity becomes inefficient or succumbs to the facts of a particular case, the cost of ambiguity would be spread primarily across the insurance system or the self-insured pool, rather than shouldered by a particular individual. This spreading of costs seems appropriate in an industry designed to protect individuals by sharing the costs of misfortune.

CONCLUSION

In *Kunin v. Benefit Trust Life Insurance Co.*, the Ninth Circuit broadly held that the rule of *contra proferentem* should be applied to ERISA plans. This Comment suggests that *Kunin* failed to analyze adequately potential preemption of the rule by ERISA, the question of whether extrinsic evidence should be considered to clarify ambiguous terms before applying the rule, and the connection between the rule and the purposes of ERISA. Furthermore, because the court did not extend its reasoning to encompass the diversity of ERISA plans to which the rule could be applied, *Kunin* cannot be read to control all varieties of ERISA contracts. Carefully applying the rule through federal common law, with sensitivity to the equities of the bargaining process behind each type of ERISA contract, or amending ERISA to permit courts to construe

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outweigh the costs of the risk that the rule may be applied to a plan. Moreover, as stated in the preceding paragraph, the fact that ERISA pension plans are subject to the rule blunts any unexpected expense that the ERISA rule would create. Finally, while an employer may act in the employee's best interests in creating a pension plan, a court must still find a way to construe an ambiguous provision that is impervious to extrinsic aids, and the fact that the employer is responsible for drafting the language helps a court construct a meaning that favors the employee. *Cf. Taylor*, 933 F.2d at 1233-34 (implying the rule would apply to severance pay plans as a last resort).

A possibly radical effect of this amendment, however, requires some discussion. The amendment, if applied to plan administrators with discretion to interpret terms, as provided in the plan, could essentially overrule *Bruch*'s holding that such discretion deserves great deference. *See Bruch*, 478 U.S. at 115; *cf. Masella*, 936 F.2d at 107 (applying the rule to plans reviewed *de novo*). Thus, the amendment could force a plan administrator faced with ambiguous language to favor the employee after considering extrinsic evidence. This Comment does not shrink in the shadow of this consequence, but argues that Congress could not have intended to empower plan administrators in a manner such that insurers and employers are encouraged to draft unclear plan terms in order to impose their own interpretations upon the employee-beneficiary.

140. *See Kunin*, 910 F.2d at 540.

ambiguous terms in ERISA plans in favor of the plan beneficiary, would address these weaknesses and fulfill ERISA's promise of fairness and protection for employees.